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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/528,006

Filing Date: January 05, 2006

Appellant(s): MESSIER, PIERRE

Seth E. Snyder
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed October 3, 2009 appealing from the Office action mailed February 17, 2009.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

4,951,664	NIEMEYER	8-1990
5,582,865	REZUKE et al.	12-1996

4,927,692 DHANAKOTI et al. 5-1990

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1 and 9 are rejected under 35 U.S.C. 102(b) as being anticipated by Niemeyer (4,951,664).

As to Claims 1 and 9, Niemeyer discloses a combination comprising: a permeable facemask (10) having a periphery adapted to abut a user's face (Figures 1 and 2); a compressible gasket (30) formed of a permeable filtering material on said periphery of said facemask (Figures 1 and 2) adapted to sit between said periphery of said facemask and a face of the user thereby filling any space that may exist there between; said permeable facemask (10) having an area for filtering air which is interior to said periphery and not covered by said gasket (30). Regarding the limitation of providing an air path therethrough, gasket (30) allows air to be forced out of or absorbed into the gasket (30) during compression and expansion. (Column 5, Lines 1-6). Further, regarding the additional material (32) covering the gasket (30), Niemeyer discloses the material is impermeable to particles as small as 5 microns. (Column 5,

Lines 7-28). As such, it is understood that air may pass through this material as air has a smaller particle size than 5 microns.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 2-8, 11-16, 18-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Niemeyer (4,951,664) in view of Rezuke et al. (5,582,865).

As to Claims 2, 7, 8, and 15-16, Niemeyer discloses a permeable facemask, yet does not expressly disclose the incorporation of active agents within the compressible gasket. However, at the time the invention was made the use of active agents within the compressible gasket were known. Specifically, Rezuke teaches the compressible gasket may include active agents such as: ion exchange resins and further discloses the use of impregnated iodine for the purpose of improving the filtering efficiency. (Column 3, Lines 48-49, and Examples II, VIII, and IX). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Niemeyer to include an active agents such as: ion exchange resins, as taught by Rezuke to impart superior filtering qualities to the filtering mask.

As to Claims 3-6, and 11-14, Rezuke teaches the composite filter element (16) is made of a non-woven polyester batting. (Figures 1, 2, 2a, and 2b; and Column 2, Line 45 thru Column 3, Line 20).

As to Claims 18 and 19, Rezuke teaches the fiber matrix is utilized to entrap active agents. (Column 5, Lines 65-67).

As to Claim 20, Rezuke teaches the non-woven material is polypropylene (Column 2, Lines 66-67).

As to Claim 21, Rezuke teaches the use of active agents such as ammonia, which is a biocide. (Column 5, Line 51-52).

As to Claim 22, Rezuke teaches the use of active agents such as Bromine, a halogen (Column 5, Line 31-33), and activated carbon (Columns 4, 5, 6, and 7).

As to Claims 23 and 24, Rezuke teaches the use of metals for the active agent such as zinc chloride (Column 4, Lines 60-67).

As to Claim 25, Rezuke teaches the filter based material includes an electrical charge. (Column 3, Lines 48 and 49).

5. Claims 26 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Niemeyer (4,951,664) in view of Rezuke et al. (5,582,865) as applied to claim 25 above, and further in view of Dhanakoti (4,927,692).

As to Claims 26 and 27, the system of Niemeyer /Rezuke discloses a facemask, yet does not expressly disclose the layering of the electrostatic charge and about 25 kilovolts. However, at the time the invention was made the use of a layered

electrostatic charge and about 25 kilovolts was known. Specifically, Dhanakoti teaches the use of a multi-layer design (Figure 3c) in the application of electrostatic charges (Column 2, Lines 5-10) to a facemask for the purpose of evenly distributing the electrostatic charge across the facemask thereby reducing charge densities. (Abstract). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the system of Niemeyer /Rezuke to include the multilayer electrostatic charge as taught by Dhanakoti, for the purpose of enhancing the filtering effect of the facemask.

(10) Response to Argument

Appellant's arguments have been fully considered, but they are not persuasive. Appellant asserts: Niemeyer does not disclose or teach a "compressible gasket formed of a breathable filtering material". Examiner respectfully disagrees with Appellant's assertions.

Niemeyer discloses a face mask (10) having a compressible gasket (30); wherein, element 30, an open cell foam second material, (Column 4, Lines 62-65) is covered by element 32, elastic third material impermeable to particles as small as 5 microns. (Column 5, Lines 7-11). In operation of the device of Niemeyer, the compressible gasket (30), allows air to be forced out of or absorbed in to it during compression and expansion. (Column 5, Lines 1-6). While the third material (32) covering the compressible gasket allows leakage of the gas from the compressible

gasket (30) to the environment or patient for particles smaller than 5 microns. (Column 5, Lines 7-28).

As addressed in the Final Office Action, mailed February 17, 2009, the mask of Niemeyer has a “compressible gasket formed of a breathable filtering material” as claimed. In an attempt to circumvent the prior art, Appellant has asserted the difference between the terms: “breathable” and “breathability”, where the term “breathability” relates to the effort required to breathe though the mask. (Appellant's Appeal Brief, Page 13, Lines 14-16). Examiner appreciates the term “breathability” has a specific meaning in the facemask arts that is different from the generic term breathable. However, it should be noted that the term " breathability" and its associated denotations are not supported in the original disclosure as filed. As such, weight given to the unsupported term “breathability” would constitute new matter if added to the Appellant's disclosure. Furthermore, with respect to the term ” breathability" in the context of the Niemeyer reference, the presence of the ability of gases to be leaked from the compressible gasket constitutes a breathable structure having a specific breathability. Assertions as to the level of breathability are unfounded, as this term and these features are not supported in the original disclosure as filed. Therefore, as gases smaller than 5 microns are able to pass through the compressible gasket (30) via the third material (32) the facemask of Niemeyer has a “compressible gasket formed of a breathable filtering material”.

Thus, in light of the aforementioned reasoning, the rejection of the claims has been maintained.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Annette F Dixon/

Examiner, Art Unit 3771

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/Justine R Yu/
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TQAS, TC 3700